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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 334

VITO F. LANZA and CHARLES F. RANK,

Petitioners,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney pro se

IRVING GALT
Assistant Solicitor General

SHELDON RAAB
Deputy Assistant Attorney General,

of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

VITO F. LANZA and CHARLES F. RANK,

Petitioners,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO EITHER OR BOTH OF THE SUPREME COURT OF THE STATE OF NEW YORK AND THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION

Opinions Below

The opinion of the New York Supreme Court, Kings County, is reported at 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). The memorandum affirmance by the New York Appellate Division, Second Department, is reported at

15 App. Div. 2d 552, 222 N.Y.S. 2d 1019 (1961). The opinion of the New York Court of Appeals and the dissenting opinions are reported at 11 N.Y. 2d 317, 183 N. E. 2d 670 (1962). These opinions are printed as Appendices II, III and IV, respectively, of the Petition. In addition, an unreported oral opinion of the New York Supreme Court, Kings County, handed down one week prior to the reported opinion, is printed as Appendix I of the Petition.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3) which, to the extent here pertinent, provides:

> "§ 1257. State courts; appeal; certiorari
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari • • • where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution • • • of the United States • • •."

Statutes and Constitutional Provisions Involved

The statute here challenged by petitioners is Chapter 971 of the New York Laws of 1961, set forth in Appendix A of this brief. Chapter 971 repealed and replaced the former New York Education Law § 2553(2), printed as Appendix B of this brief.

The provisions of the federal Constitution now relied upon by petitioners are (1) Article I, § 10; (2) Article IV, § 4; and (3) Amendment XIV, § 1; the pertinent parts of which are set forth in the Petition, p. 3.

Questions Presented

Whether petitioners' claim that the statutory termination of their terms of office as unsalaried members of the board of education for the City of New York violates either (A) the due process clause of the fourteenth amendment or (B) the constitutional prohibition against bills of attainder, presents a federal question of any substance?

Whether the New York State statute involved, insofar as it provides for a method of appointment of new members of the board of education, is open to challenge by the petitioners once it has been determined that their terms of office have been validly terminated?

Whether petitioners can now raise any question based on Article IV, § 4, of the United States Constitution, in view of their failure to raise any such federal question in the New York courts?

Whether, even if otherwise properly presented, petitioners' claim that the statute's provision for appointment of members of the board of education violates (A) the guaranty to each state of a republican form of government, Article IV, § 4, (B) the equal protection clause of the fourteenth amendment, or (C) any other clause of the United States Constitution, raises any substantial federal question?

Whether petitioner Lanza has standing to raise *any* question, in view of the fact that even if the challenged statute had not been enacted his term of office as a member of the board of education would have expired in May, 1962?

Statement

Petitioners here seek review of a judgment of the New York Court of Appeals upholding the constitutionality of a statute (Chapter 971 of the New York Laws of 1961) reorganizing and reconstituting the board of education for the City of New York.

The Legislature enacted Chapter 971 at an Extraordinary Session which was convened by the Governor on August 21, 1961, for the purpose of taking remedial action with respect to certain serious problems and conditions existing in the educational system of the City of New York.

The New York Legislature noted, in Section 1 of the challenged statute, that "conditions existing in the school system of the City of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action." These conditions, the Legislature declared, include "irregularities in the school construction program—serious hazards in school buildings due to inadequate maintenance and improper repairs—instances of corruption among employees—staggering administrative complexities and needless red tape." Further, the preamble points out that "the educational well-being of almost one million children is directly affected" and that the commissioner of education "has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action" (Laws of N. Y., 1961, ch. 971, § 1).

In the Legislature's judgment, the prevailing situation made it imperative that a new board of education be appointed and that corrective action be undertaken as expeditiously as possible. To this end, provision was made for the prompt appointment of a new board of education for the City of New York from a list of nominees to be submitted to the Mayor by a selection panel composed of leaders of representative educational, civic, business, labor and professional groups interested in the field of education. By this means, the Legislature established a method of selection designed to secure "persons of outstanding experience, competence and qualification for service on the board of education." The statute specified that the terms of office of the incumbents should expire, and those of the new members begin, on September 20, 1961 (*id.*, §§ 2 and 3).

In addition, the statute strengthened the powers of the board of education and provided for a system of close supervision of the educational affairs of the city school district of New York City by the regents and the commissioner of education during an "emergency period" which was to continue until July 1, 1962 (*id.*, § 7).

Chapter 971 of the Laws of 1961 repealed and replaced the former New York Education Law § 2553(2), which had provided for a board of education for New York City, consisting of nine members appointed by the Mayor. Petitioners are two former members of the board of education whose appointments antedated the enactment of Chapter 971 and whose terms of office otherwise would not have expired until May 1962 and sometime in 1964, respectively. They brought this action on September 19, 1961 (the day before the deadline for the Mayor to make his appointments to the new board) for a judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from making appointments to the board "in [petitioners'] place and stead."

The New York Supreme Court, Kings County, finding no merit to any of the plaintiffs' contentions denied the application for a temporary injunction and dismissed the complaint. 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). The Appellate Division unanimously affirmed. 15 A. D. 2d 552, 222 N.Y.S. 2d 1019 (1961). On appeal to the Court of Appeals of the State of New York the validity of the statute again was upheld. 11 N. Y. 2d 317, 183 N. E. 2d 670 (1962). The Court of Appeals modified the judgment, however, to accord with New York practice, by affirmatively granting declaratory judgment for defendants instead of merely dismissing plaintiffs' complaint. Accordingly, judgment was directed in favor of the defendants (respondents herein) (1) declaring that Chapter 971 of the Laws of 1961 is constitutional and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the board of education in accordance with the provisions of the statute.

The decision in the Court of Appeals was by a 4-3 vote. Contrary to petitioners' implication that there was a division in the Court of Appeals over the questions now raised in this Petition (see Petition p. 5), the sole ground for dissent in the Court of Appeals was a state ground—Article III, § 1, of the New York State Constitution. The dissenters viewed the statute's provisions for appointment of new members of the board of education as an unconstitutional relinquishment of legislative power in violation of that section. 11 N. Y. 2d at 334, 340; 183 N. E. 2d at 680, 683. There was no disagreement among the judges with respect to any of the federal constitutional questions raised in the Petition.

Argument

The federal questions raised by this petition are utterly without merit. Having failed in the New York courts, where their contentions based upon the federal Constitution were given short shrift even by the dissenting judges in the Court of Appeals, petitioners now seek review of questions which, particularly in light of prior decisions of this Court, can only be regarded as frivolous.

Before proceeding to a discussion of the frivolity of the questions raised by the petition, it should be noted that petitioner Lanza would appear to have no standing to raise *any* question at this time, since even if Chapter 971 of the New York Laws of 1961 had not been enacted, his term of office as a member of the board of education for New York City would have expired in May, 1962 (See Complaint, par. 7).

As for petitioners' grievances, it would appear that they center about (1) the termination of their tenure of office and (2) the fact that they were not appointed to the reconstituted board. Neither grievance can be made into a federal question even remotely deserving of review by this Court on certiorari.

I. The statutory termination of petitioners' terms of office is clearly constitutional.

Petitioners attack the validity of the statute's termination of their terms of office as (1) a denial of due process, in violation of the fourteenth amendment, and (2) a bill of attainder, in violation of Article I, § 10, of the Constitution of the United States.

The office held by each of the petitioners was created by the New York State Legislature, and was subject to regulation solely by that Legislature. There is no constitutional inhibition, state or federal, against the mere shortening by the Legislature of the term of an existing statutory office—especially where (as here) the office-holder serves without compensation. See *Dodge* v. *Board of Education of Chicago*, 302 U. S. 74, 78-79 (1937); *Long* v. *Mayor of City of New York*, 81 N. Y. 425, 427-428 (1887). Nor was the instant statute a product of a vindictive state of mind as petitioners seem to suggest; it was designed as a means of providing prompt corrective action in connection with conditions in the school system of the City of New York which had given rise to grave concern on the part of the Legislature. (See Laws of N. Y., 1961, ch. 971 § 1). In an attempt to assure expeditious correction of these conditions, the Legislature inaugurated a new method for selecting the board of education and conferred additional powers, previously lacking, on the new board (*id.*, §§ 6, 7, 8). Petitioners' claim that the statute deprives them of a right to due process is frivolous.

Similarly, petitioners' contention that the statute is actually a bill of attainder is without substance. There is no basis whatever for the charge that either the purpose or effect of Chapter 971 of the Laws of 1961 was to punish or impeach petitioners or any other incumbent member of the former board, or to render them ineligible for consideration as potential appointees to the new board. The

legitimate purposes of the statute—expeditious correction of deleterious conditions in the New York City School system and the creation of a new, more effective and efficient board of education—are plain for all to see.

This statute has none of the objectionable characteristics of a bill of attainder. An attainder inflicts *punishment* without a judicial trial. See *United States* v. *Lovett*, 328 U. S. 303, 315, 324 (1941); *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 323 (1867); *Garner* v. *Los Angeles Bd. of Public Works*, 341 U. S. 716, 722 (1951); *Communist Party* v. *Subversive Control Bd.*, 367 U. S. 1, 82-88 (1961). Nowhere does this statute bar petitioners from consideration for appointment to the new board of education. Nor does it disqualify them from holding public office, as did the legislation struck down in *United States* v. *Lovett*, *supra*, relied upon by petitioners. The *Lovett* case is wholly inapposite to the case at bar—here these *unsalaried* officials have not been deprived of any property right. Indeed, their major argument appears to be that they were attainted because others, rather than they, were appointed to the new board of education; that contention, of course, is patently absurd.

II. The statute's provisions for appointment of new members of the board of education are clearly constitutional and, in any event, petitioners have no standing to challenge them in this Court.

Petitioners' pique at not being appointed to the new board of education is reflected in their attack on the statute's provisions for appointment to the new board of education as violative of (1) the "Guaranty Clause," Article IV, § 4, of the United States Constitution, and (2) the equal protection clause of the fourteenth amendment.

Not only are these contentions frivolous, but petitioners lack standing even to raise them. First, if petitioners'

terms of office were validly terminated, they hardly could be aggrieved by the use of any method of selecting the members of the new board. Second, in the case of the argument based on the Guaranty Clause, petitioners are attempting to raise a federal question for the first time in this Court. Nowhere in the pleadings or briefs before any of the New York State courts does it appear that Article IV, § 4, of the United States Constitution was drawn into question. In none of the opinions handed down by the New York courts is there any discussion of the Constitutional guaranty to each state of a republican form of government. This failure to raise the federal question in the state court proceeding is itself sufficient reason for the court to decline review. Cf. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York Central R.R.* v. *New York*, 186 U. S. 269, 273 (1902); REVISED RULES OF THE SUPREME COURT, Rule 23 (1)(f).

Even if the petitioners' argument had been raised before the New York courts it would at most raise a non-justiciable issue and would not present a basis for invalidating state action. *Baker* v. *Carr*, 369 U. S. 186, 223-24 (1962); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74 (1930).

And, even if justiciable, these arguments would be frivolous. Petitioners' proposition is apparently, that because the statute provides for the Mayor to appoint members of the board of education from a list of nominees submitted by a panel of "private" persons, it somehow violates the clause guaranteeing a republican form of government. The far-fetched nature of this contention should be plain. It is transparently an attempt to make a federal question out of the one issue in the case—the question of the constitutionality of the method of appointment provided for by the statute—with which the Court of Appeals had some difficulty. The difficulty however, was caused solely by a provision of the New York State Con-

stitution. This clause, Article III, § 1, provides that "the legislative power of this State shall be vested in the Senate and Assembly." The dissents in the Court of Appeals were on the single ground that the statute's provisions for appointment amounted to an impermissible relinquishment of legislative power in violation of this provision of the state constitution. 11 N. Y. 2d at 334, 340; 183 N. E. 2d at 680, 683.

No federal ground was raised in opposition to the provisions for nomination by the selection board in the court below, and it is impossible to see any ground which could reasonably have been raised. The question of the New York State Legislature's power to prescribe the method by which offices created by that Legislature shall be filled is a question for the New York courts to determine. The majority of the Court of Appeals, in an opinion amply supported by reason and authority, found no delegation of legislative authority (11 N. Y. 2d 317, 327-334, 183 N. E. 2d 670, 676-680. In the words of that Court:

> "whether we regard the selection board as 'private' or 'public', we perceive no constitutional bar to the legislative designation of a nominating panel, made up of people representing a knowledgeable cross section of city interests, either active or vitally interested in the educational life of the city, who could reasonably be expected to present to the mayor, on an objective and non-partisan basis, the names of individuals exceptionally qualified for service on the board of education."

(11 N. Y. 2d at 333; 183 N. E. 2d at 679).

Even assuming, *arguendo*, that the statute's provisions for appointment are somehow reviewable by this Court, their constitutionality is clear. Traditionally, appointments are within the domain of executive action; this remains the case where, as here, a public officer, the Mayor of the City of New York, makes the actual choice from among the nominees offered by the panel. *Sunshine Coal*

Co. v. *Adkins*, 310 U. S. 381, 399 (1940). In view of the fact that the Legislature here has not delegated governmental powers to a previously existing non-governmental group, but rather has designated a number of individuals, previously unrelated to each other, to make up a new governmental body with specific responsibilities in the field of education, it seems incongruous to characterize the panel or its members as "private". They appear no less "public" in the performance of their special statutory function of providing nominees than any other officers of government. Moreover, even if the panel could conceivably be classed as "private" this would in no way affect the validity of their action. See *Cusack* v. *City of Chicago*, 242 U. S. 526 (1917); *St. Louis Iron Ry.* v. *Taylor*, 210 U. S. 281 (1908).

To be sure, statutory delegation might in some extreme cases threaten basic concepts of fairness. For example, statutes which give certain occupational groups the right to exclude others from the same occupation may impair due process. Even this principle, however, is subject to sharp qualification in the case of professional groups, *e.g.*, the activities of character committees in approving applicants for admission to the Bar, and examination and licensing by boards of experts in other professions. See *e.g.*, New York Education Law §§ 6607, 6703, 6802. But, certainly, where an agency has no licensing or regulatory functions whatever, and merely recommends nominees from among whom a public official will make the ultimate appointments, due process is not violated. Since there exists no danger of unwarranted restrictions on outsiders or abuse of power resulting from lack of political responsibility, no reason remains for suspecting a constitutional defect in the statutory selection procedure. See *Cusack Co.* v. *City of Chicago*, 242 U. S. 526 (1917) *supra*; DAVIS, ADMINISTRATIVE LAW, 71-72, 87 (1951 Ed.).

Petitioners' contention that the *administration* of the statute somehow deprives them of the equal protection

of the laws is without any substance whatever. How the allegation—unsupported by the record—that petitioners were not considered by the selection panel for appointment to the new board of education can be made the basis of a claim of unconstitutionality is simply beyond comprehension. It is clear from the statute that petitioners were and are not barred from consideration by the selection panel. As possible nominees for appointment to the new board, they stand on no different footing from anybody else.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be denied.

Dated: New York, New York, September 12, 1962.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney pro se

IRVING GALT
Assistant Solicitor General

SHELDON RAAB,
Deputy Assistant Attorney General,
of Counsel.

APPENDIX A

Laws of New York, 1961, Chapter 971

AN ACT to amend the education law, in relation to reconstituting the board of education for the city school district of the city of New York, providing for the emergency supervision of such district, and making appropriations in relation thereto

Became a law August 21, 1961, with the approval of the Governor. Passed, on message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The conditions existing in the school system of the city of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include

—irregularities in the school construction program

—serious hazards in school buildings due to inadequate maintenance and improper repairs

—instances of corruption among employees

—staggering administrative complexities and needless red tape.

The commissioner of education has warned that this is a time of crisis for the New York city schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected.

§ 2. Notwithstanding any other provision of law, on the effective date of this section, the terms of office of the persons then comprising the membership of the board of education of the city school district of the city of New York shall terminate.

§ 3. Notwithstanding the provisions of subdivision two of section twenty-five hundred fifty-three of the education

law, as added by section five of this act, the members of the board of education of the city school district of the city of New York shall be appointed to fill the vacancies occurring on the effective date of section two of this act in the manner prescribed by this section.

Within five days after the effective date of this act, the board of regents shall request the following persons to convene with the chancellor of the board of regents as a selection board for the purpose of submitting the names of nominees to the mayor of the city of New York to fill such vacancies:

the president of Columbia University;

the chancellor of the City University of New York;

the president of New York University;

the president of the Association of the Bar of the City of New York;

the president of the New York City Central Trades and Labor Council;

the president of Commerce and Industry Association of New York, Inc.;

the president of the Public Education Association;

the president of the United Parents Associations of New York City, Inc.;

the president of the League of Women Voters of the City of New York;

the president of Citizens Union; and

the president of the Citizens Budget Commission, Inc.

To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The chancellor

of the board of regents shall be the chairman of such selection board, but he shall not participate in the final selection of the nominees. In the event that the chancellor of the board of regents shall be unable to act, the vice-chancellor of the board of regents shall act in his place.

The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.

At least five days before the effective date of section two of this act, the selection board shall submit a list to the mayor of at least eighteen names of nominees, who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. On the effective date of section two of this act, the mayor shall appoint nine persons from among the nominees to be the members of the board of education of the city school district of the city of New York. If the mayor shall fail to make such appointments on the effective date of section two of this act, the state commissioner of education may make such appointments in his place from among the nominees submitted to the mayor.

If the selection board shall submit less than eighteen names of nominees to the mayor five days before the effective date of section two of this act, the mayor shall be required to fill from the names submitted that number of vacancies equal to one-half the number of names submitted disregarding resulting fractions and the mayor may fill any remaining vacancies on the effective date of section two of this act without regard to the provisions of this section.

Notwithstanding any other provision of law the terms of office of the members of the board of education appointed on the effective date of section two of this act shall be as follows: the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-two, the terms of office of two members shall expire on the first Tuesday in May, nineteen hundred sixty-three, and the terms of office of the remaining members of the board appointed on the effective date of section two of this act shall expire on the first Tuesday of May in nineteen hundred sixty-four, nineteen hundred sixty-five, nineteen hundred sixty-six, nineteen hundred sixty-seven and nineteen hundred sixty-eight, respectively. Each of their successors shall be appointed in the manner specified by the provisions of subdivision two of section twenty-five hundred fifty-three of the education law as added by section five of this act and shall hold office for a term of seven years expiring on the first Tuesday in May, except that in the event of a vacancy occurring other than by expiration of term, the successor shall hold office for the unexpired term.

§ 4. Subdivision one of section twenty-five hundred fifty-three of the education law, as last renumbered and amended by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, is hereby amended to read as follows:

1. No person shall be eligible to the office of member of a board of education who is not a citizen of the United States and who, *in the case of the city school districts of the cities of Buffalo, Rochester, Syracuse, Yonkers and Albany,* has not been a resident of the city school district for which he is chosen for a period of at least three years immediately preceding the date of his election or appointment *and who, in the case of the city school district of the*

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

city of New York, is not a resident thereof on the date of his appointment.

§ 5. Subdivision two of section twenty-five hundred fifty-three of such law, as last amended by chapter two hundred eighty-nine of the laws of nineteen hundred sixty-one, is hereby **repealed*** and a new subdivision two is inserted in lieu thereof, to read as follows:

2. The members of the board of education of the city school district of the city of New York shall be appointed in the manner prescribed by this subdivision.

At least twenty-five days prior to the expiration of the term of office of any member, or within ten days after the occurrence of a vacancy otherwise than by expiration of term, the mayor of the city of New York shall request the following persons to convene as a selection board for the purpose of submitting the names of nominees to him for appointment to the board of education:

the president of Columbia University;

the chancellor of the City University of New York;

the president of New York University;

the president of the Association of the Bar of the City of New York;

the president of the New York City Central Trades and Labor Council;

the president of Commerce and Industry Association of New York, Inc.;

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* NOTE—Subdivision 2 of Section 2553 of the Education Law, repealed by this act, provides for the appointment of members of the board of education of the city school district of the city of New York by the mayor of said city. Such provisions will be superseded on the effective date of this act by new subdivision 2 of Section 2553.

the president of the Public Education Association;

the president of the United Parents Associations of New York City, Inc.;

the president of the League of Women Voters of the City of New York;

the president of Citizens Union; and

the president of the Citizens Budget Commission, Inc.

To constitute a quorum, it shall be necessary for at least seven of the persons specified to attend. The president of the Association of the Bar of the City of New York shall be the chairman of the selection board and shall, forthwith upon receiving the request of the mayor, give notice to the others specified of the time and place of convening. In the event that the president of the Association of the Bar of the City of New York shall be unable to act, the mayor shall designate one of the other persons specified to convene the selection board and to be its chairman.

The selection board shall receive and take into consideration in making its nominations recommendations from representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.

Within fifteen days after the mayor shall have requested a convening of the selection board, it shall nominate to the mayor for each vacancy three to five persons who, in the judgment of the selection board, are persons of outstanding experience, competence and qualification for service on the board of education. Within ten days after receiving such nominations, the mayor shall appoint from among the nominees one person to fill each vacancy.

In the event the selection board shall fail to submit its nominations to the mayor within fifteen days after the mayor shall have requested its convening, the mayor may

fill a vacancy without regard to the provisions of this subdivision.

§6. Subdivisions two and three of section twenty-five hundred sixty-four of such law, such section having been so renumbered by chapter seven hundred sixty-two of the laws of nineteen hundred fifty, and subdivision five of such section, as last amended by chapter six hundred thirty-nine of the laws of nineteen hundred sixty-one, are hereby amended to read, respectively as follows:

2. There shall be in each of such districts a local school board of five members appointed by the [president of the borough in which such district is located] *board of education in such city. The board of education shall give at least thirty days notice of its intention to make such appointment or to fill such vacancy as may occur which shall be published in the same manner as notice of public hearings provided that such notice need not contain the name of any prospective appointee. The board of education shall take into consideration in making such appointment the recommendations made to it by community and neighborhood groups active in the local school board district and by representative associations, civic, educational, business, labor and professional groups active or interested in the field of education.* The board of education shall designate as a member of a local school board one member of the board of education and the city superintendent of schools shall assign one assistant superintendent to advise with such board.

3. The term of office of a member of such board shall be five years. A vacancy on such board shall be filled by the [borough president] *board of education* for the unexpired term.

5. A member of a local school board who publicly declares that he will not accept or serve in the office of mem-

ber of such board, or refuses or neglects to attend three successive meetings of such board, of which he is duly notified, without rendering a good and valid excuse therefor in writing to the chairman or secretary of such board, vacates his office by refusal to serve. It shall be the duty of the remaining members of the local school board to determine by a majority vote whether the excuse is a good and valid one. If they find that the excuse is not a good and valid one, they shall declare said office vacant and shall forthwith notify the board of education [and the borough president] of such vacancy. Thereafter such vacancy shall be filled by the [borough president. If the borough president neglects at any time to fill any vacancy on the school board within ninety days after he has been notified of such vacancy, then the mayor shall be empowered to fill such vacancy] *board of education.*

§ 7. Such law is hereby amended by adding thereto a new section, to be section twenty-five hundred fifty-four-a, to read as follows:

§ 2554-a. Special provisions relating to the city school district of the city of New York during emergency period. 1. As used in this section, the term "emergency period" shall mean the period from the effective date of this section to the first day of July, nineteen hundred sixty-two.

2. In order to place the educational affairs of the city school district of the city of New York under the closer supervision of the regents and the commissioner during the emergency period, the board of education of such district shall submit to the regents and the commissioner and to the mayor of the city of New York on the first day of January and April, nineteen hundred sixty-two, an interim progress report in such form and detail as the commis-

sioner shall prescribe and on the first day of July, nineteen hundred sixty-two, a final report in such form and detail as the commissioner shall prescribe as to:

a. the corrective action taken in the emergency period and planned by the board of education with respect to the administration of the program for new school building construction;

b. the corrective action taken in the emergency period and planned by the board of education with respect to the repair and maintenance of existing school buildings and other structures under the control of the school district;

c. the disciplinary action taken in the emergency period with respect to employees guilty of accepting gratuities in relation to the performance of their duties, and the corrective action taken by the board of education to prevent recurrences of such misconduct;

d. the corrective action taken in the emergency period and planned by the board of education with respect to administrative reform and the development of a program for the division of responsibility between the board and the superintendent of schools and the administrative staff for the more efficient and effective management of the district;

e. the plans developed and action taken in the emergency period by the board of education for the revitalization of local school boards and for increased participation of residents throughout the city of New York in the affairs of their local neighborhood schools;

f. the plans developed and action taken in the emergency period by the board of education to establish a long-range program and the necessary staff organization for better informed and coordinated planning of new school construction and the modernization of existing structures; and

g. the steps taken in the emergency period by the board of education to evaluate and to improve the quality of instruction in the schools.

3. During the emergency period, the board of education of the city school district of the city of New York shall have, specifically, the power:

a. To undertake any studies, inquiries, surveys or analyses it may deem relevant through the personnel of the district or in coöperation with or by agreement with any other public or private agency;

b. To employ and at pleasure remove educational, engineering, architectural, legal or management consultants and such other assistants as it may deem necessary for the performance of its functions and fix their compensation within the amounts made available by appropriation therefor;

c. Notwithstanding the provisions of subdivision one of section twenty-five hundred sixty-five of this chapter, to remove at its pleasure by a vote of a majority of all its members, the superintendent, any deputy superintendent or any associate superintendent of schools of the district irrespective of the date of their appointments, provided, however, that the board may enter into a contract with the superintendent of schools for a period of not less than three and not more than five years; and

d. To authorize the superintendent of schools and the administrative staff of the district by by-law, rule, regulation or resolution to exercise on its behalf such of its administrative and ministerial powers and duties with respect to the administration of the city school district, the purchase, repair, remodeling, improvement or enlargement of school buildings or other buildings or sites and the construction of new buildings as the board deems necessary

or desirable for the more efficient administration of the district, or for the more expeditious completion of school construction, maintenance or repairs; provided, however, that the board shall not authorize the superintendent of schools and the administrative staff to exercise any powers and duties relating to its investigative or judicial functions.

§ 8. Not later than the first day of February, nineteen hundred sixty-two, the state board of regents and the state commissioner of education shall submit to the governor and the legislature specific recommendations for such permanent changes in the laws of the state as they may deem advisable for the organization and more effective administration of the city school district of the city of New York, including, but not limited to, recommendations as to:

a. The powers necessary to ensure the board of education complete freedom to operate for the best interests of the schools unhampered by restrictive influence and controls.

b. The revitalization of the present system of local school boards in such city school district.

c. The effective participation by the people throughout the city of New York in the government of their local schools.

d. The delineation of functions and responsibilities between members of the board of education and the superintendent of schools and the administrative staff of such city school district.

e. The interrelationship of such city school district and its board of education with official agencies of the city of New York.

f. The construction, maintenance, operation and repair of school buildings and other buildings under the control of such city school district.

§ 9. The sum of one hundred fifty thousand dollars ($150,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for he use of the board of education of the city school district of the city of New York for its expenses, including personal service, in carrying out the reporting provisions of this act, in employing consultants or in undertaking studies, inquiries, surveys or analyses in relation thereto. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved by the chairman or president of such board of education and by the state commissioner of education.

§ 10. The sum of twenty-five thousand dollars ($25,000), or so much thereof as may be necessary, is hereby appropriated from any moneys in the state treasury in the general fund to the credit of the local assistance fund, not otherwise appropriated, and shall be available for the state fiscal year ending March thirty-first, nineteen hundred sixty-two, to the state education department for the purpose of enabling the state board of regents and the state commissioner of education to carry out the provisions of section eight of this act. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved as provided by law.

§ 11. This act shall take effect immediately, except that sections two, six and seven shall take effect the thirtieth day following the date of enactment of this act.

APPENDIX B

Former New York Education Law § 2553(2). (Prior to repeal by Laws of N. Y., 1961, Ch. 971).

§ 2553. Board of education; eligibility; how chosen; term of office; vacancies.

* * *

2. In the city school district of the city of New York there shall be a board of education consisting of nine members, who shall be appointed by the mayor. Two members of such board shall be residents of the borough of Manhattan, two shall be residents of the borough of Brooklyn, two shall be residents of the borough of the Bronx, two shall be residents of the borough of Queens, and one shall be a resident of the borough of Richmond. The term "resident" as used in this subdivision shall mean a person who has resided and been a qualified voter in said borough for at least three years immediately preceding the time of his appointment. The term of office of each member of such board shall be seven years and shall expire on the first Tuesday in May. As vacancies occur on such board they shall be filled from the several boroughs so that each borough shall always be represented on such board as required under this subdivision. A vacancy occurring otherwise than by expiration of term shall be filled for the unexpired term.

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